

Jurius

## Used Copies and Licences of Computer Programs may be Resold

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ECJ – The initial acquirer of a copy of a computer program, accompanied by an unlimited user licence, may resell that copy and his licence to a new acquirer. However, where the original material medium of the copy that was initially delivered has been damaged, destroyed or lost, that acquirer may not provide his back-up copy of that program to that new acquirer without the authorisation of the rightholder. (Judgement C-166/15)

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[Rz 1] In Latvia, criminal proceedings have been brought against Mr Aleksandrs Ranks and Mr Jurijs Vasievis, who are charged with, inter alia, the unlawful sale, as part of a criminal organisation, of objects protected by copyright and intentional unlawful use of another person's trade mark. They are alleged to have sold various copyright-protected computer programs published by Microsoft (such as versions of the Microsoft Windows software and the Microsoft Office suite) on an online marketplace in 2004. It is estimated that they sold more than 3'000 copies of programs and the material damage caused to Microsoft by the activities of Mr Ranks and Mr Vasievis has been evaluated at €265'514.

[Rz 2] In those circumstances, the Rgas apgabaltiesas Kriminllietu tiesu kolija (Criminal Law Division of the Riga Regional Court, Latvia), before which the case has been brought, asks the Court of Justice whether EU Law must be interpreted as meaning that the acquirer of a back-up copy of a computer program, stored on a non-original material medium, may, under the rule of exhaustion of the rightholder's distribution right laid down in an EU Directive,<sup>1</sup> resell that copy where (i) the original material medium of that program, acquired by the initial acquirer, has been damaged and (ii) that initial acquirer has erased his copy or ceased to use it.

[Rz 3] In its judgment, the Court considers that it follows from the rule of exhaustion of the distribution right that the holder of the copyright in a computer program (in the present case, Microsoft) who has sold, in the EU, a copy of that program on a material medium (such as a CD-ROM or a DVD-ROM) with an unlimited user licence can no longer oppose the subsequent resale of that copy by the initial acquirer or subsequent acquirers of that copy, notwithstanding the existence of contractual terms prohibiting any further transfer.

[Rz 4] However, the questions referred concern the resale of the used copy of a computer program, stored on a non-original material medium (back-up copy'), by a person who acquired it from the initial acquirer or from a subsequent acquirer.

[Rz 5] The Court notes that the directive grants the holder of the copyright in a computer program the exclusive right to do or to authorise the permanent or temporary reproduction of that program by any means and in any form, in part or in whole, subject to the specific exceptions laid down in the directive. The lawful acquirer of a copy of a computer program, placed on the market by the rightholder or with his consent, may therefore resell that copy, provided that that sale does not adversely affect the rightholder's exclusive reproduction right and that any acts of reproduction of that program are authorised by that rightholder or are covered by the exceptions laid down in the directive.

[Rz 6] In that respect, the Court points out that the directive provides that the making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use. Any contractual provisions contrary to that rule are to be null and void.

[Rz 7] The making of a back-up copy of a computer program is therefore subject to two conditions. That copy must (i) be made by a person having a right to use that program and (ii) be necessary for that use.

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<sup>1</sup> Pursuant to the directive on the legal protection of computer programs (Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ 1991 L 122, p. 42), the rule of exhaustion of the copyright holder's distribution right establishes the principle that the first sale of a copy of a computer program in the EU, by the rightholder or with his consent, exhausts the right to distribute that copy in the EU.

[Rz 8] According to the Court, that rule, which lays down an exception to the exclusive reproduction right of the holder of the copyright in a computer program, must be interpreted strictly.

[Rz 9] It follows that a back-up copy of a computer program may be made and used only to meet the sole needs of the person having the right to use that program and that, accordingly, that person cannot – even though he may have damaged, destroyed or lost the original material medium – use that copy in order to resell that program to a third party.

[Rz 10] The Court therefore holds that the directive must be interpreted as meaning that, although the initial acquirer of a copy of a computer program accompanied by an unlimited user licence is entitled to resell that copy and his licence to a new acquirer, he may not, however, in the case where the original material medium of the copy that was initially delivered to him has been damaged, destroyed or lost, provide his back-up copy of that program to that new acquirer without the authorisation of the rightholder.

Judgement of the ECJ C-166/15 of 12 October 2016 in case Aleksandrs Ranks and Jurijs Vasievis  
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